IN THE

OCT 25 1972

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1398

JOHN W. WARNER, Secretary of the Navy,
Petitioner,

v.

JOHN W. FLEMINGS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71-6314

JAMES ROY GOSA,
Petitioner,

v.

J. A. MAYDEN, Warden
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

~~MOTION FOR LEAVE TO FILE~~ BRIEF AS *AMICUS CURIAE* ~~AND BRIEF~~ OF THE WORKERS DEFENSE LEAGUE, ~~*AMICUS CURIAE*~~

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Motion for Leave to File Brief as *Amicus Curiae*

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The undersigned, as counsel for the Workers Defense League, located in New York City, respectfully moves this Honorable Court for leave to file the accompanying brief as *Amicus Curiae*. The written consent of the attorneys for all parties has been obtained and filed with the Clerk of the Court. Although the brief was not served within the period prescribed by the Rules of this Court, counsel for all parties were advised, when their consent was requested, that the text of the accompanying brief would be forwarded to them on October 13, 1972, and that service of the printed brief would be accomplished not later than October 23, 1972. Said dates have been complied with.

Respectfully submitted,

ROWLAND WATTS
112 East Nineteenth Street
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Attorney for Workers Defense League

October 20, 1972

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BRIEF OF THE WORKERS DEFENSE LEAGUE, *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The Workers Defense League is submitting a brief herein as *amicus curiae* because of its interest in the question of jurisdic-

tion and the impact of court-martial proceedings in these cases.

The Workers Defense League is an organization dedicated to the protection and extension of those civil rights which are guaranteed by the laws and Constitution of the United States. It has long been concerned with military justice, and previously appeared as *amicus curiae* in *Harmon v. Brucker*, 355 U.S. 579 (1953).

The Workers Defense League maintains that courts-martial, despite recent improvements, have always been fundamentally and procedurally infected with infirmities which mandate this Court's rejection of their past assertions of jurisdiction over offenses respecting which the Federal and State civil courts had statutory jurisdiction.

ARGUMENT

IF RETROACTIVE APPLICATION OF *O'CALLAHAN* IS NOT MANDATED BY CLASSICAL JURISDICTIONAL CONCEPTS, ADMINISTRATIVE IMPACT WOULD BE SO MINOR, AND PERSONAL IMPACT ON THE FORMER DEFENDANT SO SUBSTANTIAL, AS TO MERIT GRANTING OF RETROACTIVITY.

The cases at bar are concerned with the possible retroactive application of this Court's holding in *O'Callahan v. Parker*, 395 U.S. 258 (1969), as refined in *Relford v. Commandant*, 401 U.S. 355 (1971). In effect, this Court will determine whether, if retroactivity is not mandatory, it is appropriate in light of the considerations set forth in *Linkletter v. Walker*, 381 U.S. 618 (1965), and *Stovall v. Denno*, 388 U.S. 293 (1967).

It is our contention that retroactivity is required because *O'Callahan* is concerned with what Judge Weinstein aptly termed "classic competence jurisdiction," *United States ex rel.*

Flemings v. Chaffee, 330 F.Supp. 193, 196 (E.D. N.Y. 1971). It is horn book law that the rulings of a court lacking power over the person or the act involved are necessarily null and void. To hold otherwise "would militate against our whole concept of power and jurisdiction," *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 248 (1960).

If, nonetheless, the *Linkletter-Stovall* considerations are here pertinent, we contend that the onerous effects of punitive discharges awarded by courts-martial are so substantial, and the burden upon the Government of administering appropriate relief to affected applicants so readily met, as to compel this Court to hold that court-martial jurisdiction should always have been limited to the least possible power adequate to protect valid military interests, *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955). Every unnecessary extension of military jurisdiction has constituted an improper encroachment upon the civil courts and the treasured personal rights secured by the Bill of Rights, *Reid v. Covert*, 354 U.S. 1, 21 (1957).

We therefore offer to this point the following data and arguments.

A. ADMINISTRATIVE IMPACT OF RETROACTIVITY WOULD BE MINOR

During the three year interval since the *O'Callahan* decision, the only published statistical analysis of its probable retroactive impact has been Blumenfeld, *Retroactivity after O'Callahan: an Analytical and Statistical Approach*, 60 Geo. L. J. 551 (1972) (hereafter, *Blumenfeld*). We have made a case-by-case analysis of all pre-O'Callahan opinions reported in Volumes 3, 8, 13 and 18 of Decisions of the United States Court of Military Appeals, so as to augment the data presented in *Blumenfeld*. Of the 590 cases analyzed, 10 (1.7%) would probably be affected by retro-

activity; 139 (23.6%) of the opinions do not contain sufficient factual information for determining the effect with reasonable certainty; the remaining 441 (74.7%) almost certainly will not be affected by the outcome of the cases at bar. Appendix A gives the enumerations by categories.

The figures for affected cases should be read with some caution. Approximately one-third of all courts-martial involve unauthorized absences (denounced by Article 86, Uniform Code of Military Justice, 10 U.S.C. §886); Appendix B; cf. *Blumenfeld*, 580-581, n. 149. It has been the experience of the Military Justice Program of *amicus* that such cases present few evidentiary or procedural problems likely to be granted review by the Court of Military Appeals. Consequently, civilian-type offenses are reviewed in that Court with greater proportional frequency than are they tried by courts-marital. As there is no reason to believe that, prior to the *O'Callahan* decision, *O'Callahan-Relford* considerations were weighed in deciding whether to grant review in the Court of Military Appeals, any over-representation of civilian-type offenses in the sample of cases analyzed would *à fortiori* extend to cases which would be affected by retroactive application of *O'Callahan*.

The above data lend weight to Blumenfeld's determination that "approximately one percent of all general court-martial cases tried and appealed from June 2, 1969, until December 31, 1970, involved offenses that were nonservice-connected," *Blumenfeld*, 580, n. 147. The data suggest that said determination can be generalized to all such courts-martial during the past two decades.

Even if it is assumed that substantial numbers of affected individuals would seek administrative or judicial relief,* the

* A questionable assumption in the light of recent experience. See *Blumenfeld*, 578 *et. seq.*, n. 140-149. As a practical matter, only sentences to lengthy periods of confinement or punitive discharge create a sufficient-

attendant administrative burden is insufficient cause for rejecting retroactivity. "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government," *Reid v. Covert, supra*, at 14. If we are indeed a nation ruled by laws, not men, judicially rewriting the Constitution to suit alleged administrative convenience would constitute a blatant succoring of bureaucratic arrogance.

B. CONSEQUENCES OF PUNITIVE DISCHARGES ARE DISPROPORTIONATELY SEVERE WHEN CONTRASTED WITH CIVILIAN SENTENCES

A Bad Conduct or Dishonorable Discharge can be given only upon conviction by general or certain special courts-martial. In the Army, approximately 81% of all enlisted men convicted by general courts-martial during calendar years 1964-1968 were adjudged punitive discharges. Appendix B, Table B-3. After serving any sentence of confinement, the recipient of such a discharge is subject to consequences which far exceed any disability that can grow out of a civilian criminal conviction.

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ly great burden on the affected individual as to cause efforts to obtain relief years later. Virtually no summary court-martial convictions are likely to be attacked. Few if any special court-martial convictions not resulting in a Bad Conduct Discharge would be challenged.

It should be noted that our statistics are not necessarily representative of convictions prior to 1951. Those convictions antedate Congressional and Presidential actions designed to secure a fair trial for an accused serviceman. In such cases, the very fact-finding procedure upon which the conviction is predicated is necessarily suspect. Thus there is substantial doubt that Flemings in fact stole the car (in 1944); there is no serious doubt that Goss committed the rape (in 1966).

The recipient of a punitive discharge is deprived of virtually all veterans' benefits, including medical benefits for disabilities incurred in the line of duty prior to commission of the underlying offense. (By way of contrast, a civilian employee later fired for cause does not lose disability compensation.) He is subject to the same statutory disabilities as is a civilian ex-convict. Further, he is stigmatized as disloyal at every turn in his civilian life.

Employment opportunities are all but non-existent in any branch of Government or in defense-related industry. In the balance of the private sector, employment applications universally require statements of criminal convictions and military service, including type of discharge. The punitively discharged applicant consequently starts with two red flags when seeking employment.

R-T-P, Inc. (formerly the Joint Apprenticeship Program, founded by *amicus*) advises us that approximately half of the trade unions will not entertain as apprenticeship application from recipients of punitive discharges. Those that do, do so hesitantly. The financial sector perceives a greater risk in lending money to punitively discharged persons. In Appendix C, a single but not atypical case history is described.

Regardless of the age of the accused at time of trial, there exists no effective statutory provision for expunging or remitting a punitive discharge at any time.* This contrasts with the

* Major General Kenneth J. Hodson, Chief Judge of the United States Army Court of Military Review, and formerly The Judge Advocate General of the Army, anticipates the adoption of such a provision:

> [The trial judge at courts-martial] should have the power to suspend and the power to impose deferred sentences. A deferred sentence is a sentence which is withheld for a prescribed period. If the accused straightens out, we'll say, in six months, then the judge issues an order which wipes out not only the sentence but the conviction. It

salubrious provisions of 18 U.S.C. §§4209, 5005 *et. seq.* (Federal Youth Corrections Act), 5031 *et. seq.*, and comparable legislation enacted by the various States.

The contrast is particularly striking when viewed in the light of the youthfulness of personnel tried by general courts-martial. Appendix B, Table B-1 contains data provided by the Records Control and Analysis Branch of the United States Army Judiciary for calendar years 1960 through 1969. They reveal that of 18,589 enlisted personnel tried by general courts-martial, 6,365 (34%) were below the age of twenty; 8,614 (47%) were between twenty and 24 years of age, inclusive.

During Fiscal Years 1971 and 1972, more than 90% of the records of trial received for review at the Army's Defense Appellate Division involved convictions of persons under twenty-five years old at time of trial. Appendix B, Table B-4.

Data provided by the Military Justice Division of the Office of the Judge Advocate General of the Navy, contained in Appendix B, Table B-2, are comparable. We have been advised that the Air Force does not keep comparable statistics.

We contend that the penalties involved in most of those convictions which might be voided by retroactive application of *O'Callahan* are far in excess of the maximum permitted in the civilian courts which properly had concurrent if not exclusive jurisdiction over the offenses charged. Furthermore, the possibility that subsequent good behavior would result in expunging

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purges the man's record completely. In other words, the ABA Standards on Sentencing Alternatives should be adopted . . .

Hodson, *The Manual for Courts-Martial—1984*, 57 Mil. L. Rev. 1, 11 (1972). Note that the Department of Defense has recently adopted a policy and implemented procedures favoring recharacterization of undesirable discharges (typically awarded on request, in lieu of court-martial) in cases involving use or possession of drugs. *Blumenfeld*, 572, n. 117.

the record of conviction does not exist; although in many cases it would, if the accused had been tried in civil courts.

Because the effect of retroactivity on the administration of justice, if relevant to the instant cases, must be examined from the perspectives of the affected persons as well as the administrators of justice, we submit that the data we have presented tips the balance of interests in favor of retroactive application of *O'Callahan*.

CONCLUSION

It is respectfully submitted that the judgment of the United States Court of Appeals for the Second Circuit should be affirmed, and the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

ANALYSIS OF A SAMPLE OF REPORTED DECISIONS OF THE UNITED STATES COURT OF MILITARY APPEALS FOR POSSIBLE EFFECT OF RETROACTIVITY

The opinion in every case reported in 3 USCMA (October Terms, 1952-3), 8 USCMA (October Terms, 1956-7), 13 USCMA (October Terms, 1961-2) and 18 USCMA (October Term, 1968) but excluding those cases decided subsequent to June 2, 1969, has been analyzed in an effort to determine if retroactive application of *O'Callahan* would nullify the proceedings.

In conducting the analysis, consideration was given to the following factors: (A) Was the nature of the offense(s) charged purely military (e.g., desertion, disobedience)? (B) Did the perpetrator use his or his victim's military status as an aid to accomplishing the crime (e.g., assaulting one's company commander while off post would be deemed service-connected)? (C) Was the offense committed on post or at post limits? (D) Did the crime occur in a locality where a non-military American flag court was open (N.b., Okinawa was deemed not be be such a locality on the authority of *United States ex rel. Jacobs v. Froehlke*, 334 F.Supp. 1107 (D. D.C. 1971), appeal pending)?

The results are summarized in Table A below. A list of those cases which apparently would be affected by retroactivity, and those in which the opinion is insufficiently detailed to permit such a determination, is provided so as to permit replication.

As not all courts-martial are reviewed by the Court of Military Appeals, and as cases in which the Court reversed a conviction are included in the tabulation, extrapolations from these data must be made with caution.

TABLE A: EFFECT OF RETROACTIVITY ON CASES IN SAMPLE

Vol.	Affected	Indeterminate	Unaffected	Total
3	3	16	128	147
8	4	56	162	222
13	3	30	88	121
18	0	37	63	100
total	10	139	441	590
%	1.7	23.6	74.7	100.

3 USCMA: **8 USCMA:** **13 USCMA:** **18 USCMA:**

Cases which would be affected, listed by docket number in sequence of Court's decision:

3 USCMA:	8 USCMA:	13 USCMA:	18 USCMA:
1244	9392	15700	[none]
1990	9592	16268	
2720	9444	16405	
	9768		

Indeterminate cases:

1194	9223	9646	10180	15282	16163	21346	21689
1945	9401	9738	9546	15332	16204	20903	21703
2119	9113	9861	10227	15334	16018	21342	21526
2068	9587	9762	9645	15525	16207	21004	21555
3354	9731	10331	10311	15636	16282	21203	21657
3580	9992	10428	10833	15724	16489	21223	21676
3627	9199	10597	10567	15094	15936	21100	21704
3629	9681	9647	10799	15676	16064	21465	21709
1738	9421	9737	9723	15643	16172	21106	21719
3102	9687	10009	10418	15626	16237	21306	21721
2819	9606	10088	10429	15636	16491	21253	21636
1434	9807	10198	10698	15718		21284	21628
2735	9590	9849	10888	15888		21409	21430
3449	9771	9836	11019	15615		21630	21650
2808	9774	9986	10994	15883		21742	21717
3630	9668	10109	11050	15909		21615	21913
	9783	10710	10072	15900		21633	21953
	10417	9715	10861	15741		21653	21956
	10479	10018		15999		21680	

APPENDIX B

ARMY, NAVY AND MARINE CORPS COURT-MARTIAL STATISTICS

TABLE B-1: ARMY ENLISTED PERSONNEL TRIED BY GENERAL COURTS-MARTIAL

	Calendar Year											
	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	Total	%
AGE:												
Under 20	656	581	656	698	569	468	549	763	735	690	6365	34.
20-24	663	646	734	854	812	639	758	1168	1362	978	8614	47.
25 and over ..	601	566	430	382	353	287	269	261	254	207	3610	19.
Total	1920	1793	1820	1934	1734	1394	1576	2192	2351	1875	18589	100.

GENERAL COURT-MARTIAL OR ADJUDGED BAD CONDUCT DISCHARGE BY SPECIAL COURT MARTIAL

	Calendar Year											
	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	Total
AGE 17-19:												
General Court	160	185	142	90	73	121	182	188	205	222	145	1713
BCD Special Court	1467	1337	1165	847	850	1236	1238	787	838	854	820	11439
Total	1627	1522	1307	937	923	1357	1420	975	1043	1076	965	13152
AGE 20-24:												
General Court	212	213	292	248	175	262	401	596	627	854	603	4483
BCD Special Court	1222	1159	1366	1270	1051	1373	1752	1766	1820	1814	1519	16112
Total	1434	1372	1658	1518	1226	1635	2153	2362	2447	2668	2122	20595
AGE 25-30*:												
General Court	58	55	65	58	42	50	51	72	69	98	68	686
BCD Special Court	220	159	159	136	116	134	140	147	146	132	113	1602
Total	278	214	224	194	158	184	191	219	215	230	181	2288

* For 1970 and 1971, excludes persons 30 years old.

N.b., data as to trials of Navy and Marine Corps personnel above age 30, and respecting total number of trials, is not available. Consequently, precise percentages cannot be calculated. But the available data reflect a pattern almost identical to that found in the Army data, Table B-1, and suggest that trials of persons over 30 years old, for each category, involve less than 10% of the total number of trials.

TABLE B-3: ENLISTED PERSONNEL CONVICTED BY ARMY GENERAL COURTS-MARTIAL, 1964-1968

	Calendar Year					
	1964	1965	1966	1967	1968	Total
Number Convicted .	1650	1318	1483	2086	2239	8776
Discharges Adjudged:						
Dishonorable	634	517	694	902	880	3627
Bad Conduct	729	533	496	808	915	3481
Total	1363	1050	1190	1710	1795	7108
% Convicted with Discharge	83.	80.	80.	82.	80.	81.

TABLE B-4: ANALYSIS OF ARMY GENERAL AND (BAD-CONDUCT-DISCHARGE AUTHORIZED) SPECIAL COURT-MARTIAL DATA (FISCAL YEARS 1971, 1972)

	OFFENSES TRIED	CONVICTIONS	AWOL CHARGES*	CIVIL-TYPE OFFENSES	% UNDER 25 YEARS OLD
FY 1971 .	7807	82.3%	40.4%	42.9%	92.0%
FY1972 .	7142	80.4%	26.2%	53.9%	91.5%

* Many persons accused of AWOL, in *amicus'* experience, have been permitted to accept an Undesirable or General Discharge in lieu of standing trial, pursuant to Army Regulation AR 635-200, Chapter 10. *Amicus* would further note that recent liberalization of administrative policy has reduced the rate of AWOL trials and thus inversely affected the relative frequency of trials for civil-type offenses.

* * * * *

Counsel expresses deep gratitude to personnel in the United States Army Judiciary and in the Military Justice Division of the Office of the Judge Advocate General of the Navy who fully cooperated with counsel's request for the data presented herein, and did so on very short notice.

APPENDIX C

EFFECTS OF A DISCHONORABLE DISCHARGE: A CASE HISTORY

On January 13, 1945, William A. Manera, then sixteen years old but having misrepresented his age to a draft board, was inducted into the United States Army.

Private Manera, Serial Number 42 164 526, was subsequently trained and qualified at Fort Sill, Oklahoma, to drive various military vehicles, including 3/4 ton trucks. Upon reassignment to Korea, he was required to obtain further qualification to operate military vehicles for his new unit. He did not so qualify because of an alleged failure to use proper hand signals.

On July 27, 1947, Manera and five other soldiers were given permission to travel on leave by 3/4 ton truck to a point remote from post. The assigned driver of the truck, together with his companions, suggested Manera take the wheel. At their repeated urging, and with the knowledge that the Army had previously qualified him to drive such a vehicle, Manera assumed control of the truck and proceeded to operate it with due diligence.

At one point in the trip the truck hit a large hole in the road and went out of control. Manera attempted to brake its momentum, but the brakes failed. Manera reached for the hand brake, but because of his short stature and the handle's position, he momentarily lost sight of the road. Thereupon the truck went off an embankment at the entrance to a small bridge.

Two Korean children playing at the water's edge were struck by the truck. One suffered only minor injuries, but the other died a few days later despite Manera's carrying the child to a hospital.

Manera was tried by a general court-martial for various offenses related to this unfortunate incident. He pleaded not guilty, but was convicted and sentenced to a year in confinement at hard labor, total forfeitures and a dishonorable discharge. On review, the sentence and conviction were affirmed.

On June 28, 1947, Manera was released from confinement and received his dishonorable discharge certificate. On that occasion he was given an orientation lecture by a Major in the Army. He advised Manera that he could never re-enlist, he could not go on military property, he was not allowed to vote, he could not hold a Government job and he could not personally own "titles, lands and property." As Manera has said, the Major's description of the significance of the dishonorable discharge "distorted my mind."

Returning to civilian life, Manera experienced many hardships because of the dishonorable discharge. For one year he could not obtain employment. He became financially dependent upon his adoptive grandmother. Later he was to work for a year and a half as a printer's helper by concealing the fact of his military service and dishonorable discharge. He was still quite young and entirely believable when he asserted that he had never been in the armed forces.

He left that first job and travelled to California. There he once was arrested while riding with a friend in whose car Los Angeles police allegedly found marijuana. The charges against Manera were dismissed; the friend was later acquitted. The experience of the arrest, and the scornful attitude displayed by police officials upon learning of his dishonorable discharge, convinced Manera that he would be happier back home in New York. Manera obtained employment gluing valises. As soon as he had saved enough money to leave California, he quit that job and returned to New York. There he again obtained employment in a printing shop by concealing his military history.

Subsequently, his employer learned of the dishonorable discharge. Manera was fired. Ostensibly, the cause was his falsification of the job application.

He was next employed cleaning the interiors of airplanes, first for American Airlines, later for United. In each instance, he had falsified his employment application by concealing his military experiences.

While working for the airlines, he made application for a chauffeur's license. In that application he was candid about his dishonorable discharge. After a two year wait he received the license, and became eligible to drive a taxi. About a year later, while driving hacks part time, he was examined by one Captain Delaney of the New York City Police Department, who threatened revocation of the license because of the court-martial conviction and the California arrest. Manera filed a written statement in his defense. For a period of time he most anxiously awaited the results. He never heard further about the matter.

Since 1966 he has driven taxis as his sole source of income. He lives in fear of a revocation of his hack license.

Manera has never registered to vote in the belief that he is ineligible to do so. He has never served on a jury. He is unable to obtain a loan without a cosigner. He cannot afford the purchase of a home, although with Gi benefits such a purchase would have been within his means. He was afflicted with malaria while in Korea, and has suffered occasional relapses subsequent to his discharge. He has been refused treatment in Veterans Administration hospitals for those attacks of malaria. His efforts to purchase a New York City taxi medallion (required for owners of licensed cabs, and valued in the neighborhood of $15,000) were aborted upon the broker's learning that Manera had received a dishonorable discharge.

Aside from the legal and administrative restraints on his activities, Manera bears a moral scar of which he is deeply ashamed. "I can't stand up and argue with nobody," he complains. "I have a dishonorable discharge that can be thrown up to me at any time."

On one occasion Manera assisted in the apprehension of an armed assailant of a third party. When the arresting officer offered to obtain for him publicity respecting his heroism, and indicated that it could lead to improved employment opportunities, Manera insisted that he be kept out of the public eye. He was asked if he cared to testify when the assailant was brought to trial, but could not bring himself to do so, lest others hear of his dishonorable discharge. His children, aged 4 to 12, do not know about his dishonorable discharge. How could he enjoy their respect and love were they to know?

Manera's crime was not one of moral turpitude. Unintentional vehicular homicide occurs all too frequently in the civilian world, but never results in an equivalent loss of rights, privileges and self respect. Manera was only 17 years old when he was convicted. His record is otherwise unblemished. But he has been forced to live with the burden of his conviction and dishonorable discharge for the past twenty-five years. They will be his cross until death.

"I've been afraid, more than anything else," he notes. "I cannot make a move like a normal man makes a move."

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

William A. Manera, being duly sworn, deposes and says that he has read the foregoing account entitled *"Effects of a Dishonorable Discharge: a Case History"* and it is true to the best of his knowledge and belief.

/s/ WILLIAM A. MANERA

(William A. Manera)

SWORN AND SUBSCRIBED TO BEFORE ME
THIS 11th DAY OF OCTOBER, 1972.

/s/ MARILYN S. BROOK

(Marilyn S. Brook)

Notary Public, State of
New York, No. 31-5463725
Qualified in New York County.
Commission Expires March 30, 1974.

[RAISED SEAL]